4.08 "Opening the Door" to Evidence[1]

(1) A party may "open the door" to the introduction by an opposing party of evidence that would otherwise be inadmissible when in argument, cross-examination of a witness, or other presentation of evidence the party has given an incomplete and misleading impression on an issue. In a criminal case, however, unconfronted testimonial hearsay is not admissible in response to a party's argument, cross-examination of a witness, or other presentation of evidence that is misleading.

(2) A trial court must exercise its discretion to decide whether a party has "opened the door" to otherwise inadmissible evidence. In so doing, the trial court should consider whether, and to what extent, the evidence or argument claimed to "open the door" is incomplete and misleading and what, if any, otherwise inadmissible evidence is reasonably necessary to explain, clarify, or otherwise correct an incomplete and misleading impression.

(3) To assure the proper exercise of the court's discretion and avoid the introduction of otherwise inadmissible evidence, the recommended practice is for a party to apply to the trial court for a ruling on whether the door has been opened before proceeding forward, and the court should so advise the parties before taking evidence.

Note

Subdivisions (1) and (2) recite the long-settled "opening the door to evidence" principle in New York, as primarily explained in *People v Melendez* (55 NY2d 445 [1982]); *People v Rojas* (97 NY2d 32, 34 [2001]); *People v Massie* (2 NY3d 179 [2004]); and *People v Reid* (19 NY3d 382 [2012]), as limited by *Hemphill v New York* (595 US —, —, 142 S Ct 681, 694 [2022]), which bars the introduction in evidence of "unconfronted testimonial hearsay" under the "opening the door to evidence" principle.

Melendez dealt with the issue of whether the defense had "opened the door"

to permit the prosecutor to explore an aspect of the investigation that would not otherwise have been admissible. The Court began by noting that, when an "opposing party 'opens the door' on cross-examination to matters not touched upon during the direct examination, a party has the right on redirect to explain, clarify and fully elicit [the] question only partially examined on cross-examination." (*Melendez* at 451 [internal quotation marks and citation omitted].)

Argument to the jury or other presentation of evidence also may "open the door" to the admission of otherwise inadmissible evidence. (*Rojas* at 34 ["defendant opened the door" based "on the combination of his opening statement and cross-examination of a prosecution witness"]; *Massie* at 184 [noting that a door may be opened by "evidence or argument"].)

The "opening the door to evidence" principle, however, "does have its limitations. By simply broaching a new issue on cross-examination, a party does not thereby run the risk that all evidence, no matter how remote or tangential to the subject matter opened up, will be brought out on redirect. . . . [T]he court should only allow so much additional evidence to be introduced on redirect as is necessary to meet what has been brought out in the meantime upon the cross-examination. . . . The principle merely allows a party to explain or clarify on redirect matters that have been put in issue for the first time on cross-examination, and the trial court should normally exclude all evidence which has not been made necessary by the opponent's case in reply." (*Melendez* at 452 [internal quotation marks, citations, and emphasis omitted].)

On the facts of *Melendez*, the Court ruled that "although defense counsel may have partially 'opened the door' by asking whether [one of the People's witnesses] was a suspect, the passageway thus created was not so wide as to admit the hearsay testimony directly implicating the defendant in the crimes charged." (*Id.* at 453.)

Massie recognized *Melendez* as the leading case on the subject, while noting that the application of the "opening the door to evidence" principle was not limited to cross-examination questions. *Massie* therefore set forth the guiding rule included in subdivision (2) for dealing with any "opening the door to evidence" issue in any circumstance. (*Massie* at 184 ["a trial court should decide 'door-opening' issues in its discretion, by considering whether, and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression"]; *see e.g.* Guide to NY Evid rule 4.03, Completing and Explaining Writing, Recording, Conversation or Transaction.)

Reid pointed out that the "opening the door to evidence" principle exists to "avoid . . . unfairness and to preserve the truth-seeking goals of our courts." (*Reid* at 388.) Notwithstanding that goal, *Hemphill* held that the "opening the door to evidence" principle must not permit the introduction of evidence in violation of the

Sixth Amendment's Confrontation Clause. In *Hemphill*, the defense to a murder indictment rested upon a claimed third party's culpability; in accord with New York's then "opening the door to evidence" principle, the trial court allowed the introduction of the third party's guilty plea when the third party was unavailable to testify. The parties did not dispute that the third party's guilty plea was "testimonial" hearsay, and the Supreme Court then held its admission to be in violation of the Confrontation Clause. Thus, even if it may be argued that "unconfronted testimonial hearsay" would respond to a party's misleading impression on an issue, it is not admissible: "[The Confrontation Clause] admits no exception for cases in which the trial judge believes unconfronted testimonial hearsay might be reasonably necessary to correct a misleading impression. Courts may not overlook its command, no matter how noble the motive." (595 US —, —, 142 S Ct 681, 693 [2022].)

The Supreme Court, however, made a point of stating that "the Court does not decide today the validity of the common-law rule of completeness as applied to testimonial hearsay. Under that rule, a party against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder. The parties agree that the rule of completeness does not apply to the facts of this case, as Morris' plea allocution was not part of any statement that Hemphill introduced. Whether and under what circumstances that rule might allow the admission of testimonial hearsay against a criminal defendant presents different issues that are not before this Court." (595 US —, —, 142 S Ct 681, 693 [2022] [internal quotation marks and citations omitted]; *see* Guide to NY Evid rule 4.03.)

Other examples of situations where a party "open[s] the door" to otherwise inadmissible evidence include:

- "apparent inconsistencies or contradictions in a witness' statements or acts brought out on cross-examination to discredit his testimony [which] may be reconciled on redirect by relating to the jury the relevant surrounding circumstances." (*Melendez* at 451.)

- "where cross-examination raises the inference that the witness' testimony was the product of a recent fabrication, a party on redirect can refute this allegation either by introducing consistent statements made by the witness at a time when there was no motive to lie or by having the witness explain why the information was not disclosed earlier." (*Id.*)

- "where only a part of a statement has been brought out on cross-examination, the other parts may be introduced on redirect examination for the purpose of explaining or clarifying the statement." (*Id.* at 451-452; *see* Guide to NY Evid rule 4.03, Completing and Explaining Writing, Recording, Conversation or Transaction.)

- Defense counsel's question to a police officer witness for the People

about whether there ever came a time when defendant "denied his involvement in this" opened the door to redirect examination about the defendant's exact words, namely, " 'that he was there, but he didn't rob the old lady.' " (*People v Goodson*, 57 NY2d 828, 829-830 [1982].)

- "evidence of a prior conviction [for robbery] that had been precluded by a pretrial [*Sandoval*] ruling . . . was nonetheless properly used by the prosecution on cross-examination to impeach" the testimony of defendant's witness, a psychologist, who asserted that defendant had been nonviolent throughout his life. (*People v Fardan*, 82 NY2d 638, 641 [1993].)

- "Defendant's claim that he had never seen or known [the codefendant] before his arrest on November 4, 1992 . . . opened the door to evidence . . . regarding [his] subsequent arrest with [the codefendant] on November 16, 1992 relevant for 'contradiction and response' with respect to the November 4, 1992 existence of their relationship and not simply to impeach his general credibility." (*People v Blakeney*, 88 NY2d 1011, 1012 [1996].)

- The "[d]efendant opened the door to cross-examination regarding his motivation for prior guilty pleas and was subject to impeachment by the People's use of the otherwise precluded evidence . . . where . . . defendant's testimony was meant to elicit an incorrect jury inference that he had pleaded guilty and served prison terms in prior cases, but that he would not plead guilty in this case because he was in fact innocent." (*People v Cooper*, 92 NY2d 968, 969 [1998] [citations omitted].)

- When the People's witnesses testified that the defendant "never denied" committing the crime, the trial court should have permitted the defense to introduce a taped telephone conversation between the defendant and the complainant prior to the defendant's arrest, in which the defendant denied the allegations. (*People v Carroll*, 95 NY2d 375, 386 [2000].)

Subdivision (3) follows logically on the need for the trial court to make a ruling on whether the door has been opened before otherwise inadmissible evidence that may warrant a mistrial is admitted. (*See People v Rojas*, 97 NY2d 32, 40 [2001] [the "better practice" would have been for the People to ask for a "conference" to have the court decide whether the door had been opened to a question the prosecutor asked a witness]; *see also* Guide to NY Evid rule 1.07, Court Control Over Presentation of Evidence; rule 1.09, Court Determination of Preliminary Questions.)

[1] In January 2022, subdivision (1) of this rule was amended to accord with the holding of *Hemphill v New York* (595 US —, —, 142 S Ct 681, 694 [2022]), precluding the introduction of "unconfronted testimonial hearsay" under the "opening the door to evidence" principle. And in December 2022, subdivision (1) was further amended to note that *Hemphill* applied only in criminal proceedings.